INDEX

TABLE OF AUTHORITIES

Cases:

In the

Supreme Court of the United States

October Term, 1973

No. 72-914

Sarah Scheuer, Administratrix of the Estate of Sandra Lee Scheuer, Deceased,

Petitioner,

—v.—

James Rhodes, Sylvester Del Corso, Robert Canterbury, Harry D. Jones, John E. Martin, Raymond J. Sep, Various Officers and Enlisted Men, and Robert White,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

Introductory Statement

The Court granted a writ of certiorari in this case on June 25, 1973 to review the decision of the United States Court of Appeals for the Sixth Circuit affirming the District Court's dismissal of the complaint. The opinion of the Court of Appeals is reported, *sub nom. Krause* v. *Rhodes,* at 471 F.2d 430 (6th Cir. 1972). The opinion of the district court has not been officially reported.

This suit was commenced in the United States District Court for the Northern District of Ohio, Eastern Division, with jurisdiction based upon 28 U.S.C. Section 1343, as well as the doctrine of pendent jurisdiction. The District Court dismissed the complaint on the stated ground that suit was barred by the Eleventh Amendment. Thereafter, timely appeal was taken to the United States Court of Appeals for the Sixth Circuit, which affirmed the District Court on November 17, 1972. The petition for a writ of certiorari to review the Court of Appeals' decision was filed on December 21, 1972.

Jurisdiction of this Court is invoked to review the Court of Appeals' decision pursuant to 28 U.S.C. Section 1254(1).

Constitutional and Statutory Provisions Involved in the Case

1. United States Constitution, Amendment XI:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State . . . .

2. Section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress.

3. Jurisdiction in the United States District Court was premised upon 28 U.S.C. Section 1343(3) and (4), which provide:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Questions Presented

The following questions were presented by the petition for a writ of certiorari and will be considered in this brief:

1. Whether an action brought in a United States District Court under Section One of the Civil Rights Action of 1871, 17 Stat. 13, 42 U.S.C. Section 1983, against the Governor and other officers of the State of Ohio, which specifically charges each of the named defendant state officials with personal wrongdoing causing deprivation of Constitutionally secured rights, and which demands money damages from each individually, making no claim on the Treasury of Ohio or any public funds, is an action against the State

of Ohio, thereby falling under the Eleventh Amendment's prohibition against suit of a State in a federal court.

2. Whether there is a doctrine of unqualified executive immunity which immunizes state officials from personal liability for deprivations of rights, privileges and immunities secured by the United States Constitution and, if so, whether, in an action brought under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, against the Governor of Ohio, Adjutant General of the Ohio National Guard, officers and enlisted men of the Ohio National Guard and the President of a state university, such a doctrine mandates the outright dismissal of a complaint charging each with specific personal wrongdoings causing deprivations of constitutionally secured rights.

3. Whether a United States District Court, pursuant to Rule 8 of the Federal Rules of Civil Procedure, when deciding a motion to dismiss a complaint based solely on the sufficiency of its allegations, is required to take its allegations as true.

In addition, the Court's recent decision in the related case of *Gilligan* v. *Morgan*, No. 71-1553, decided June 21, 1973, necessitates consideration of an additional issue, raised in Respondent Rhodes' brief.

4. Whether claims for money damages as a consequence of death caused by the Ohio National Guard against individuals claimed to be responsible, are rendered nonjusticiable by the Court's decision, in *Gilligan* v. *Morgan*, No. 71-1553, that the training, use and arming of National Guard troops is an inappropriate matter for federal injunctive relief.

Statement of the Case

On May 4, 1970, Petitioner's decedent and daughter, Sandra Lee Scheuer, was killed on the campus of Kent State University, Kent, Ohio, where she was a student, when a contingent of Ohio National Guard troops fired into a crowd of students and other young persons on the campus. All evidence in petitioner's possession indicates that the bullet which caused the death of petitioner's decedent was fired by a member of the Ohio National Guard and the complaint so alleges.[1]

This action was filed on September 8, 1970 and charges several persons with specific acts or omissions which caused the death of petitioner's decedent. The complaint was dismissed by the district judge and, as a consequence, there has never been a factual record developed. Therefore, the statement of the case must be limited to summarizing the complaint's allegations.

The Allegations of the Complaint

The first claim in this action is based upon Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. Section 1983. It alleges that the defendants acted in concert and subjected the plaintiff's decedent to a deprivation of rights, privileges and immunities secured by the United States Constitution, specifying that the plaintiff's decedent,

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[1] 86a. The complaint, as well as the opinions of the courts below, are attached in an appendix to the Petition for a Writ of Certiorari and are not reprinted in a separate appendix. For the remainder of this brief references to the appendix to the petition will be made as ____a, and references to the separate appendix will be made as ____A.

when shot by Ohio National Guard troops, was deprived of life without due process of law.[2]

The defendants in this action were, at the time it was commenced, the Governor of Ohio, the Adjutant General of the Ohio National Guard and Assistant Adjutant General, three commissioned officers of the Ohio National Guard, unnamed officers and enlisted men of the Ohio National Guard,[3] and the President of Kent State University. Following the conclusory allegation of deprivation of life without due process of law set forth above, the complaint proceeds to detail the charge as to each defendant with specific allegations of personal misconduct causally related to the death of plaintiff's decedent. Thus, Governor Rhodes is charged, *inter alia*, with ordering Ohio National Guard troops to break up lawful assemblies, permitting them to carry guns loaded with live ammunition and permitting them to shoot at persons without justification. Complaint, para. 13(a). Defendants Del Corso and Canterbury, Ohio National Guard Generals, are charged, *inter alia*, in addition to permitting the use of loaded guns and permitting unjustified shootings, with ordering inadequately trained and incapable troops to engage in conduct which greatly increased the risk of shooting of innocent persons. Complaint, para. 13(b) and (c).

Defendants Jones, Martin and Srp, Ohio National Guard Officers, are charged, in the alternative, with having or-

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[2] 86a.

[3] The caption describes "various officers and enlisted men" and, in Paragraph 7 of the complaint it is alleged that their names "are not now known to plaintiff" but that they "will be joined . . . as soon as their names become known . . . " On May 3, 1972, plaintiffs filed a successor complaint, treated as a new action. *Scheuer* v. *Rhodes, et al.* (N.D.O., E.D. No. C72-439, May 3, 1972), naming certain additional National Guardsmen.

dered troops to shoot at persons without legal justification or with having failed to restrain troops under their direct command from unlawful shootings. Complaint, para. 13(d). The unnamed National Guard troops and officers are charged, in substance, with having shot without legal justification or, in the alternative, pursuant to orders which were patently unlawful.

Finally, Defendant White is charged with reckless omission to act when his actions could have decreased the risk of shooting of innocent persons by the Ohio National Guard.

In addition to alleging the wrongful nature of the shooting, the complaint states that petitioner's decedent, "at the time she was shot . . . was neither engaged in a riot nor any other criminal or disruptive activity."[4]

The District Court's jurisdiction is premised, in the complaint, on the first claim, which, being based upon 42 U.S.C. Section 1983, confers jurisdiction under 28 U.S.C. Section 1343. The remaining claims set forth in the complaint are based upon state tort law and, falling under the doctrine of pendent jurisdiction, are dependent at this stage on the validity of the first claim.

The *ad dammum* clause prays for "compensatory damages against all defendants, jointly and severally, in the amount of One Million Dollars ($1,000,000.00) and for punitive damages in an amount which this Court determines is just and proper . . ." No damages are sought from the State of Ohio, its treasury or its property. Moreover, there is no known mechanism under the law of Ohio by which a judgment against the defendants would entitle the plaintiff to execution of judgment against the State of Ohio, its treasury or its property.

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[4] Para. 10. 86a.

The Theory of the Complaint

The first claim, arising under 42 U.S.C. Section 1983, rests on the theory, long recognized by the case law in this Court and the lower federal courts, that an arbitrary and unjustified killing by state officials acting under color of their official positions constitutes a deprivation of life without due process of law in violation of the Fourteenth Amendment to the United States Constitution. See *Screws* v. *United States*, 325 U.S. 91 (1945). The Court recognized, in *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961) that, unlike the criminal statute involved in *Screws, supra*, which punished "willful" deprivations of constitutional rights, 42 U.S.C. Section 1983 does not require proof of a specific intention to deprive of a constitutional right as a basis for liability. Lower Court cases, following *Monroe* v. *Pape, supra*, have treated cases of intentional infliction of injury, abuse of power or even some forms of negligence as sufficient for liability under 42 U.S.C. Section 1983. See, e.g. *Howell* v. *Cataldi*, 464 F.2d 272 (3d Cir. 1972); *Roberts* v. *Williams*, 456 F.2d 819 (5th Cir.), cert. denied 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972); *Puckett* v. *Cox*, 456 F.2d 233 (6th Cir. 1972); *Carter* v. *Carlson*, 447 F.2d 358 (D.C. Cir. 1971) rev'd on other grounds as to other defendant *sub nom. District of Columbia* v. *Carter*, 409 U.S. 418 (1973); *Jenkins* v. *Averett*, 424 F.2d 1228 (4th Cir. 1970). Consistently with such decisions, the first claim in this case alleges that the defendants acted either "intentionally, recklessly, willfully [or] ... wantonly."[5]

It is likewise the theory of the complaint that, in addition to the person or persons who shot guns, persons who,

[5] Para. 13. 87a.

acting under color of state law, intentionally, recklessly or even negligently establish the conditions or give the orders which lead to unjustified killings or injuries, are jointly liable to the same extent as the last actor. See especially *Anderson* v. *Nosser*, 456 F.2d 835 (5th Cir. 1972); *Roberts* v. *Williams*, 456 F.2d 819 (5th Cir.), cert. denied 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972); *Carter* v. *Carlson*, 447 F.2d 358 (D.C. Cir. 1971) rev'd on other grounds as to other defendant, *sub nom. District of Columbia* v. *Carter*, 409 U.S. 418 (1973).

Proceedings Below

Motions to dismiss pursuant to Rule 12(b), Fed. R. Civ. P., were filed in the District Court on behalf of all named defendants on the ground that the action, although nominally against them as individuals, was, in fact, against the State of Ohio. Defendant Rhodes likewise argued that, as a matter of law, his conduct, even if unlawful, was not the proximate cause of petitioner's decedent's death.[6] No factual matter was offered by the defendants in support of the motions other than copies of proclamations by the Governor of Ohio activating the Ohio National Guard and recording the fact of their having been ordered to active duty in Kent.[7]

The motions to dismiss in this case, and in *Krause* v. *Rhodes* and *Miller* v. *Rhodes* (No. 72-1318 in this Court), all came before District Judge Connell for decision. Judge Connell granted all of the motions, concluding that, although the complaints named individuals as defendants,

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[6] See Motion to Dismiss of Defendant Rhodes. 8A.

[7] 23a, 25a.

the suits were in fact against the State of Ohio and, as a result, prohibited by the Eleventh Amendment to the United States Constitution.[8]

Although Judge Connell nominally placed his decision on a purely jurisdictional ground, portions of his opinion read as findings of fact, despite the absence of a factual record before him. His opinion includes the conclusion that,

> "The Governor of Ohio had determined in good faith that on the basis of the facts as they appeared that mob rule existed at Kent State University and this Court cannot substitute its position for that of the executive of the State of Ohio.
>
> The question of emergency compels the Governor to act decisively in suppressing this most dangerous activity, and the citizens of Ohio so demand it."[9]

Appeal was taken to the United States Court of Appeals for the Sixth Circuit, and this case was again considered together with *Krause* v. *Rhodes* and *Miller* v. *Rhodes*. In writing the Court's opinion affirming dismissal of the complaint, Judge Weick, in addition to upholding dismissal under the Eleventh Amendment, held that "the Governor, the officers of the Guard, and the President of Kent State University all have executive immunity."[10]

Judge O'Sullivan wrote a separate, concurring opinion in which he concluded, on the basis of judicial notice, that the complaints were "contrived to hide rather than disclose

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[8] 82a.

[9] 80a.

[10] 20a.

the true background of the involved events." [11] He apparently misread the claim against Governor Rhodes as being limited to liability for sending in the National Guard and characterized the Governor's conduct as required by his office.[12]

Judge Celebrezze dissented.

ARGUMENT

Introduction

Since the claim underlying the third question presented does not attack a ground formally relied upon below but rather relates to the courts' methodology as a ground for granting review, it will be dealt with first, followed by consideration of the first and second questions presented, and then the fourth.

Summary of Argument

The lower courts, adopting a peculiar view of the facts, refused to accept the pleaded facts as true. At this point, the Court's decision must be based upon the facts pleaded.

The Eleventh Amendment has never been thought to have any bearing on damage actions against government officials charging personal wrongdoing and aimed at their personal assets. Even if it had been, the holding of *Ex parte Young*, 209 U.S. 123 (1908) that a shield of official immunity is removed when the public official acts in violation of the

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[11] 30a-31a.

[12] *Ibid.*

Constitution precludes application of the Eleventh Amendment. If the Eleventh Amendment were interpreted to bar suit here, it would be in conflict with the Fourteenth Amendment and Section One of the Civil Rights Act of 1871 and would fall for that reason. Moreover, the requirement of a constitutional remedy created in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) mandates an interpretation opening the federal courts where, as here, the State in question has closed its courts to suit against government officers.

A doctrine of personal immunity from suit is inconsistent with the goals of the Civil Rights Act and has, by and large, been rejected. Precedents in this Court adopting other forms of immunity do not extend to executive officers except in the defamation area, and the change from a no-fault to a fault principle there has made its continuation even in that area untenable.

No special immunity arises from the fact that one of the defendants was the Governor at the time in question and called out troops in a declaration of "disorder" (25a), nor does the Court's recent decision in *Gilligan* v. *Morgan*, 41 U.S.L.W. 4966 (1973), precluding injunctive relief on the same facts, bar damages here.

I.

The Court's decision on the merits must be made on the allegations of the complaint, liberally construed.

As was noted above, two of the judges who voted against petitioner's position below grounded their decisions on points of law but "found" facts not in the record. Their action, however, is inconsistent with the Federal Rules of Civil Procedure, and, in resolving the merits, this Court should limit itself to the face of the complaint.

It has long been the rule that the allegations of a complaint in federal court must be taken as true for purposes of a motion to dismiss, must be construed liberally in favor of the pleader at that stage, and the complaint may not be dismissed "unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); Rule 8(f), Fed. R. Civ. P. See also *Cruz* v. *Beto*, 405 U.S. 319, 323 (1972); *Haines* v. *Kerner*, 404 U.S. 519 (1972); *Jenkins* v. *McKeithen*, 395 U.S. 411, 423-424 (1969); *Walker Process Equipment, Inc.* v. *Food Machinery and Chemical Corp.*, 382 U.S. 172, 174-175 (1965); 2A J. W. Moore, Federal Practice ¶12.08 at pp. 2265-67. The rules just cited reflect the important policy conclusions that one who pleads facts stating a claim for relief is entitled to a day in court and that disputed, or disbelieved, facts are not to be resolved against the pleader until he has failed in proof or has failed to appropriately rebut sworn material which turns a "speaking motion" into a motion for summary judgment. 2A J. W. Moore, Federal Practice ¶12.09. That is so even if the motion to dismiss

is cast in terms of a motion under 12(b)(1) directed to the subject matter jurisdiction of the Court. *Id.* at ¶12.16, p. 2352. If such a motion involves disputed factual issues, the court must hold a preliminary, evidentiary hearing to resolve the issue of jurisdiction, see, e.g., *Sanial* v. *Bossoreale,* 279 F. Supp. 940 (S.D.N.Y. 1967), unless resolution of the jurisdictional issue is tantamount to resolution of the merits, in which case the motion is to be deferred to trial on the merits. See, e.g., *Smith* v. *Sperling,* 354 U.S. 91 (1957); *United States* v. *Cigarette Merchandisers' Association,* 18 F.R.D. 497 (S.D.N.Y. 1955).

The present case is an unusual one in that it arises from a major historical event which received great publicity, polarized public opinion and produced conflicting reports from several official sources. See *Hammond* v. *Brown,* 323 F. Supp. 362 (N.D. Ohio 1971), aff'd, 450 F.2d 480 (6th Cir. 1971); *King* v. *Jones,* 319 F. Supp. 653 (N.D. Ohio 1971), rev'd 450 F.2d 478 (6th Cir. 1971), judgment of Court of Appeals vacated and remanded to District Court for dismissal on mootness grounds, 405 U.S. 911 (1972). Many of the factual matters are explored at greater length in the briefs of *amici curiae.* It is clear, however, that two of the key factual issues raised by the complaint—whether the Ohio National Guard troops were justified in shooting in the direction of civilians and whether the conditions leading to that shooting were laid by the misconduct of the defendants—were also issues that have drawn much discussion in the press, especially in Ohio.

With that backdrop, the district judge, and at least one of the Court of Appeals judges, obviously got caught up in the passion of the events and accepted an unproved version of the events which was inconsistent with the pleadings.

The district judge "found" that Respondent Rhodes, then the Governor of Ohio, acted "in good faith" (80a). Judge O'Sullivan seems to have concluded that, despite pleadings to the contrary, the entire course of action followed by the defendants was fully warranted by the circumstances (30a).

At this point, such premature factual judgments have already worked a hardship on petitioner to the extent that they contributed to the dismissal and, therefore, delayed trial of the action. The only effective remedy at this point, however, would be for this Court to deal with the legal issues as raised by the pleaded facts, rather than on the basis of the findings below.

Moreover, the suggestion, made for the first time in the brief of Respondent Rhodes in opposition to the petition for a writ of certiorari (at pp. 7-8) that attachment of two gubernatorial proclamations to the motion to dismiss made that motion a "speaking" motion for summary judgment is untenable. There are no sworn facts set forth in such proclamations. (They are at 23a.) In fact, they do no more then memorialize the fact that the Governor ordered units of the militia to duty in and around Kent State University to maintain peace and order. They do not purport to establish any material facts which could affect the outcome of this suit, such as the existence of an insurrection, nor could they.

II.

The Eleventh Amendment to the United States Constitution does not bar suit in federal court against individuals for damages.

The striking thing about the decision of the Courts below that the Eleventh Amendment to the Constitution precludes maintenance of this action in federal court is its novelty. In the context of a damage action against the personal assets of state officers, such a claim has rarely been discussed in the cases and finds no support in precedent.

The substance of the Eleventh Amendment argument, as set forth in Judge Weick's opinion for the Court below, is that, since the conduct of state officials, in performing their official functions might be affected by the fear of liability for injuries caused by their conduct, the State, through them, would be affected. The reasoning follows, then, that a suit which affects the State is actually a suit against the State.

Taken to its logical extreme, the argument would work a total repeal of the Civil Rights Act, and, indeed, would immunize state officials from suit in federal court on many other bases, such as diversity jurisdiction. For that reason alone, it cannot be given credence.

This Court has, in the past, explicitly recognized that the Eleventh Amendment has no real role to play in suits seeking damages from persons who also happen to be state officials. See, e.g., *Ford Motor Company* v. *Treasury Department of Indiana,* 323 U.S. 459 (1944); *Great Northern Ins. Co.* v. *Read,* 322 U.S. 47, 50-51 (1944). The clearest

statement of that proposition came in the opinion of Justice Reed, for a unanimous Court, in the first of the cases just cited in which he wrote,

> "Where relief is sought under general law from wrongful acts of State officials, the sovereign immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally" (citations omitted), 323 U.S. at 462.

Moreover, the distinction between suit against an individual governmental officer for personal damages and suit against governmental entities for damages from the public treasury as a consequence of governmental officers' misconduct has recently been adhered to by the Court in the highly analogous area of suits against municipalities. See *Moor* v. *County of Alameda*, 41 U.S.L.W. 4627 (1973). See also *Monroe* v. *Pape*, 365 U.S. 167 (1961). Cf. *City of Kenosha* v. *Bruno*, 41 U.S.L.W. 4819 (1973). Indeed, the decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961) upholding damage actions under the Civil Rights Act is dependent upon rejection of the Eleventh Amendment argument accepted by the Court below. Suit for money damages under 42 U.S.C. Section 1983 is, under *Monroe*, possible for abuse of office only because the holding of governmental office—State or local—is necessary to supply the "State action" turning conduct which is otherwise merely tortious under state law into a deprivation of a constitutional right. See also *Williams* v. *United States*, 341 U.S. 97 (1951); *Screws* v. *United States*, 325 U.S. 91 (1945); *United States* v. *Classic*, 313 U.S. 299 (1941). If the very "state action" which created the federal right to relief under Section

1983 were to be the basis for rejection of a federal remedy, the *Monroe* decision would effectively be a nullity. That is especially so since both the opinion of the Court and the separate concurring opinion of Justice Harlan recognize that it was the purpose of the Congress, in adopting Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. Section 1983 not merely to create a federal right but to afford a federal judicial remedy as an alternative to the state-court remedy. See also *District of Columbia* v. *Carter*, 409 U.S. 418, 425-429 (1973).[13] Thus, *Monroe* v. *Pape* must be read as rejecting a jurisdictional bar of any kind to suit against individuals for damages.

Moreover, such a conclusion is in full harmony with the traditional understanding of damage suits against governmental officers. That understanding was that, while sovereign immunity protected the State, it did not protect its employees. Harper & James summarize the tradition as follows:

> The Anglo-American tradition did not include a general theory of immunity from suit or from liability on the part of public officers. It was the boast of

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[13] This is especially clear from the original text of the Act, which combined both the substantive and jurisdictional provisions.

In its original form, Section One of the Civil Rights Act of April 20, 1871 provided, in relevant part:

> . . . any person . . . shall . . . be liable to the party injured in any action at law, suit in equity or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal review upon error and, other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, 1866 . . . ; and the other remedial laws of the United States which are in their nature applicable in such cases. 17 Stat. 13.

Subsequent codifications have separated the statute into two sections, 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343.

Dicey, often quoted, that "[w]ith us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act without legal justification as any other citizen." 2 F. Harper & F. James, The Law of Torts 1632-33 (1956) (footnotes omitted).

The State, however, was traditionally immune from suit without its consent. It was that immunity which the Congress, in proposing adoption of the Eleventh Amendment, sought to protect from abrogation by unconsented federal Court suit. See, e.g., *Employees of Dep't of Public Health and Welfare of Missouri* v. *Dep't of Public Health and Welfare of Missouri*, 41 U.S.L.W. 4493 (1973); *Hans* v. *Louisiana*, 134 U.S. 1 (1890); Jacobs, *The Eleventh Amendment and Sovereign Immunity* 109-110 (1972).

Since there was no purpose to protect a non-existent personal immunity, it is logical that the Eleventh Amendment makes no mention of restricting federal Court jurisdiction over individuals. It is simply limited to overruling the proposition, established temporarily in *Chisholm* v. *Georgia*, 4 Dall. 419 (1793), that the State's immunity from unconsented suit was rendered unavailable when the plaintiff could lodge jurisdiction in federal Court.

That the foregoing, limited, interpretation was the one generally attached to the Eleventh Amendment at the time the Civil Rights Act of 1871 was adopted is reflected in the remarks of various members of Congress at the time. Representative Kerr, for example, made the following statement:

"I hold that the constitutional power of the Federal Government to punish the citizens of the United

States for any offenses punishable by it at all may be exercised and exhausted against the individual offender and his property; but when you go one inch beyond that you are compelled, by the very necessities which surround you, to invade powers which are secured to the States . . ." Cong. Globe, 42d Cong., 1st Sess. 788 (1871).

Thus, it can fairly be said that the Eleventh Amendment has nothing to do with damage suits against public officials, and was never understood to have any bearing on such suits. In the area of damages, the Eleventh Amendment is limited in its applicability to efforts to directly execute on the public treasury, see, e.g., *Parden* v. *Terminal R. Co.*, 377 U.S. 184, 192 (1964) or to get at public moneys or property by nominal suit against individual officers who, pursuant to State law, are a conduit for release of State moneys. See, e.g., *Ford Motor Co.* v. *Treasury Department of Indiana*, 323 U.S. 459 (1944); *Great Northern Ins. Co.* v. *Read*, 322 U.S. 47 (1944). See also *Re New York*, 256 U.S. 490 (1921).

Moreover, even if the Court were to consider the case a closer one and accept the view that damage suits against State officials were no different in status from suits for injunctive relief, the Eleventh Amendment would not bar suit.[14] That result necessarily follows from *Ex Parte Young*, 209 U.S. 123 (1908), one of the cornerstones of American constitutional jurisprudence, which established the rule that suit against an individual governmental officer is not, within the meaning of the Eleventh Amendment, a

[14] Clearly, injunction suits against government officers are a much more direct, and severe, interference with states' sovereignty than damage suits against such persons.

suit against the State. See 3 K. Davis, Administrative Law §27.03 at 553. *Ex parte Young* has been "consistently followed to the present day." See *Georgia Railroad and Banking Co.* v. *Redwine*, 342 U.S. 299 (1952); *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964). It is therefore worth examination.

Young was the Attorney General of Minnesota and was charged with enforcing compliance with rate schedules ordered by the State Railroad Commission. Shareholders of railroads subject to the tariff reductions ordered by the Commission brought an action in the Federal Circuit Court seeking injunctive relief, based, *inter alia*, on the unconstitutionality of the Commission's orders and statute. The federal Court issued a preliminary injunction restraining Young from taking any steps to enforce the remedies or penalties of the statute. He was then held in contempt for violating the order.

A habeas corpus petition filed in the Supreme Court was premised on the settled rule that the Federal Circuit Court's order of contempt was invalid if the Court lacked jurisdiction to act in the main case. Young argued that jurisdiction was lacking under the Eleventh Amendment, because the suit affected the government of the State and was in effect one against the State of Minnesota. 209 U.S. 143. In support of the contempt, it was argued that, to the extent that enforcement of state law violated the Fourteenth Amendment to the United States Constitution, that Amendment limited the effect of the Eleventh. 209 U.S. 150. The Supreme Court, however, following a solid line of decisions running back to *Osborn* v. *United States Bank*, 9 Wheat. 738, 846, 857 (1824) held that the action was not one against the State of Minnesota. The Court reiterated

and confirmed the settled rule that an individual officer, acting in violation of the federal constitution, could not be treated as the State or as acting for the State. 209 U.S. 159. Even the first Justice Harlan, who dissented on the injunction aspect of the case and rejected the fiction that the State was not affected, conceded that suits against individual officers of the State, charged with personal wrongs, were not suits against the State. 209 U.S. 189.

Thus, in 1908, the Supreme Court settled the law that a suit not naming the State as a party, which charges individual wrongdoing or deprivation of constitutional rights, is not a suit against the State.

This Court, and the lower courts have continued to recognize the viability of the "fiction" created by *Ex parte Young*. See, e.g., *Employees of Dep't of Public Health & Welfare of Missouri* v. *Dep't of Public Health and Welfare of Missouri*, 41 U.S.L.W. 4493, 4498, n. 9 (1973) (concurring opinion of Marshall and Stewart, JJ.) ("Of course, suits brought in federal court against State officers allegedly acting unconstitutionally present a different question [from suits against State agencies]."); *Sostre* v. *McGinnis*, 442 F.2d 178, 205 (2d Cir. 1971) (*en banc*); *Whitner* v. *Davis*, 410 F.2d 24 (9th Cir. 1969); *Board of Trustees of Arkansas A & M College* v. *Davis*, 396 F.2d 730 (8th Cir.), cert. denied 89 Sup. Ct. 401 (1968); *Bayer* v. *Chaloux*, 288 F. Supp. 366 (N.D.N.Y. 1968). See also *Neal* v. *Georgia*, 469 F.2d 446 (5th Cir. 1972).

Furthermore, even if one were to argue that *Ex parte Young* has lost its viability or is based upon an untenable fiction and suit against state officials for conduct arising from their official positions was, because of its effect, suit against the State, that would not end the matter. In fact,

however suit against individuals for money or injunctions is characterized for Eleventh Amendment purposes, there is no question that the Congress, in 1871, intended to create both liability and federal jurisdiction for such suits. That intention is clear from the text, see footnote 13, *supra*, and the legislative history, as summarized in *Moor* v. *Alameda County*, 41 U.S.L.W. 4627 (1973); *City of Kenosha* v. *Bruno*, 41 U.S.L.W. 4819 (1973); *District of Columbia* v. *Carter*, 409 U.S. 418 (1973) and *Monroe* v. *Pape*, 365 U.S. 167 (1961).

If the Eleventh Amendment were interpreted as precluding suits against State officers, absent consent of the State, in federal Court, the Court would have to decide whether the intention of Congress should nevertheless be given effect. In a recent decision, a majority of the Court has reiterated the position, earlier established in *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964), that Congress, when acting within its legitimate substantive powers, can impose federal court jurisdiction on a "State" despite the Eleventh Amendment. *Employees of Dep't of Public Health and Welfare of Missouri* v. *Dep't of Public Health and Welfare of Missouri*, 41 U.S.L.W. 4493 (1973).[18]

[18] Justice Douglas wrote the majority opinion for himself, the Chief Justice and Justices White, Blackmun, Powell and Rehnquist. The only dissent from this position came in the concurring opinion of Justices Marshall and Stewart, who argued that the Congress could not enlarge on a specific restriction on Article III of the Constitution and that the Eleventh Amendment was such a restriction. 41 U.S.L.W. at 4496-4499. Justice Brennan dissented from the majority opinion, 41 U.S.L.W. 4499, but likewise rejected the view that the Eleventh Amendment is a constitutional limitation on federal judicial power. 41 U.S.L.W. 4503. Moreover, his reading of *Hans* v. *Louisiana*, 134 U.S. 1 (1890) as not precluding suit against a state by its own residents would result in non-application of any interpretation of the Eleventh Amendment to this action, brought by an Ohio resident against Ohio officials.

Here, of course, the legislative power of Congress to act was supplied by Section Five of the Fourteenth Amendment, which provides:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Thus, even if the Fourteenth Amendment would not itself abrogate an interpretation of the Eleventh Amendment which closed the federal courts to suit against State officers, the Congress had the power to do so, see, e.g., *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), and, in fact, intended to do so.

Additionally, an interpretation of the Eleventh Amendment which closed the federal courts to suits such as the present one, and an interpretation of the Fourteenth Amendment or 42 U.S.C. Section 1983 which did not open them would still not foreclose the matter. Rather, jurisdiction of the federal courts over actions such as this one would independently be required by the decision in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens*, of course, held that the Constitution—in that case the Fourth Amendment—gave rise to a right to damages caused by its violation even in the absence of enabling legislation. The Court has recently noted that the *Bivens* remedy is likewise applicable in suits, analogous to this one, charging misuse of governmental force. *District of Columbia* v. *Carter*, 409 U.S. 418, 432-433 (1973).[16]

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[16] In holding that 42 U.S.C. Section 1983 was not applicable to the District of Columbia, the Court stated:

> "This is not to say, of course, that a claim, such as a possible claim against officer Carlson, of alleged deprivation of constitutional rights, is not litigable in the federal courts of the District [citing *Bivens*]." 409 U.S. 432-433.

If, following *Bivens*, the Constitution gives rise to a remedy for abuse, it does so for the reasons set forth in the *Bivens* decision. Those are that reliance on the often conflicting rules of tort law existing from State to State would, at worst, provide for nullification of remedies according to local views and, at best, would provide for different capabilities to effect such rights from State to State. See especially concurring opinion of Harlan, J., 403 U.S. at 400.

Thus, *Bivens* must be read as compelling the holding that the due process clause of the Fourteenth Amendment compels a remedy of damages for violation. If the federal courts are closed to such suits, however, the individual citizen's right to relief is dependent upon whether the courts of the State in question are open to suit of that character. For, persons injured by Ohio governmental officials, relief would not be possible because the State Supreme Court has consistently held that the local courts are without jurisdiction to hear suits against the State, see, e.g., *Krause* v. *Ohio*, 31 Ohio St.2d 132, 285 N.E.2d 736 (1972); *Wolf* v. *Ohio State University Hospital*, 170 Ohio St. 49, 162 N.E.2d 475 (1959); *Raudabaugh* v. *State*, 96 Ohio St. 513, 118 N.E. 102 (1917), and that suit against an individual State officer, acting in his official capacity, is a suit against the State. See, e.g., *State ex rel. Williams* v. *Glander*, 148 Ohio St. 188, 74 N.E.2d 82 (1947). As a result, in Ohio, a conclusion that a provision of the United States Constitution required a damage remedy would be meaningless unless the Court were also to hold that included in that remedy, by interpretation, is a restriction on the operation of any broadened interpretation of the

Eleventh Amendment to exclude its applicability when a constitutional remedy is being asserted.[17]

It would thus take a wholesale repudiation of years of constitutional history and the overruling of several recent decisions for this Court to affirm the decision below. Such a slaughter of precedent, however, would not be supported by sound policy but, on the contrary, would be running against a tide of opinion which holds that sovereign immunity "runs counter to prevailing notions of reason and justice." *Larson* v. *Domestic and Foreign Corporation*, 337 U.S. 682, 709 (1949) (Frankfurter, J., dissenting). See, e.g., Jaffe, *Suits Against Government and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963); Borchard, *Governmental Liability in Tort*, 34 Yale L. J. 1, 129, 229, 757, 1039 (1926). The Eleventh Amendment, as a codification of concepts of sovereign immunity, should not be expanded into new ground when its *raison d'etre* has itself been repudiated.

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[17] There is one other respect in which *Bivens* compels reversal here. If suit against a state official is suit against a state because it interferes with the operation of state government, then, logically, suit against a federal officer, for parallel reasons, must be a suit against the federal government. But suit against the federal government is barred by federal sovereign immunity unless consented to by Congress. See, e.g., *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682 (1949); *Dugan* v. *Rank*, 372 U.S. 609 (1963). The Federal Tort Claims Act contains no waiver of immunity for intentional torts, or constitutional deprivations of the kind involved in *Bivens*. See 28 U.S.C. Sections 1346, 2674 and 2680. As a result, *Bivens* must be read to hold that suit against officers is not suit against the government, and *Stare Decisis* applies to this action.

III.

The individual defendants sued in this action have no personal immunity from suit for the wrongs alleged in the complaint.

The alternative ground of decision adopted by the Court of Appeals—that all of the defendants in this suit had an absolute, executive immunity from suit by virtue of their official positions—is different from the Eleventh Amendment contention in that it deals with substantive immunity rather than the Court's jurisdiction. It is also true that it is not so totally devoid of support as the jurisdictional argument. The practical effect of its acceptance, however, would be parallel to acceptance of the Eleventh Amendment position in this suit; it would work a *pro tanto* repeal of that provision of 42 U.S.C. Section 1983 which specifically authorizes liability "to the party injured in an action at law," i.e., money damages from the wrongdoer. Moreover, it reflects a profound policy conclusion which this Court should not embrace. That conclusion is that, *in all circumstances,* affording governmental officials freedom from the restraint of potential liability for misconduct of even the worst kind in office is a higher value than the value or interest of individuals sought to be protected by the substantive provision of the Constitution opposed to it. In this case, to uphold the Court of Appeals' decision, the Court must categorize the individual's interest in not being deprived of life without due process of law as of lesser importance than the freedom of government officials to act without restraint. If it does so, the Court will erect a value judgment over the framers of the Constitution,

who chose to erect the right to be free of arbitrary taking of life as part of the Fifth and Fourteenth Amendments and nowhere mentioned officials' freedom from suit as one of the inviolate tenets of our governmental system.

The claim that there is an executive immunity to suit for constitutional deprivations, although not definitively dealt with by this Court, has been rejected by the great majority of lower courts which have considered the issue. See, e.g., *Carter* v. *Carlson*, 447 F.2d 358, 365 (D.C. Cir. 1971), rev'd on other grounds as to other party, 409 U.S. 418 (1973); *Jobson* v. *Heine*, 355 F.2d 129 (2d Cir. 1965); *Birnbaum* v. *Trussell*, 347 F.2d 86 (2d Cir. 1965); *Roberts* v. *Williams*, 456 F.2d 819 (5th Cir.), cert. denied 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972); *Jones* v. *Perrigan*, 459 F.2d 81 (6th Cir. 1972); *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968). By and large, the courts have rejected immunity for the reasons set forth in Judge Hays' opinion for the Second Circuit in *Birnbaum, supra,*

> "A showing that defendants acted within the scope of their employment and authority is not sufficient to defeat the district court's jurisdiction. It would nullify the whole purpose of the civil rights statute to permit all government officers to resort to the doctrine of official immunity. The statutory condition of defendants acting under color of state or territorial law contemplates that he act in an official capacity. To the extent that state or municipal officers, such as defendants Trussell and Mangum, violate or conspire to violate constitutional and federal rights, the Civil Rights Laws §§1979 and 1980 (3), 42 USC §1983 and 1985 (3), abrogate the doctrine of official immunity.

See The Doctrine of Official Immunity Under the Civil Rights Act, 68 Harv. L. Rev. 1229 (1955)." 347 F.2d at 88-89.

Moreover, such courts have soundly rejected application of executive immunity to Civil Rights Act suits despite the existence of respectable precedent supporting executive immunity for some common law torts, see, e.g., *Barr* v. *Mateo*, 360 U.S. 564 (1959); *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), and for legislative, *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), and judicial, *Pierson* v. *Ray*, 386 U.S. 547 (1967), immunity to Civil Rights Act suit.[18]

The *Tenney* decision forms no serious precedent for executive immunity to a charge of deprivation of constitutionally secured right. While the Constitution is totally silent on the subject of executive immunity, legislative immunity from suit for acts committed pursuant to legislative office is specifically granted by the Constitution. The Speech and Debate clause, Art. I, §6, cl. 1[19] was adopted, as an immunity, for the express purpose of protecting the legislative from the executive branch of government, had long antecedents, and has long been interpreted by the Court as a total and absolute immunity for acts within the scope of legislative office. See, e.g., *Doe* v. *McMillan*, 41 U.S.L.W. 4752 (1973); *Gravel* v. *United States*, 408 U.S. 606 (1972); *United States* v. *Brewster*, 408 U.S. 501

[18] The only respectable precedential support for immunity of executives to Civil Rights Act suit is the opinion of Judge Medina on the remand in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972). The limits of the *Bivens* precedent will be discussed below.

[19] " . . . for any Speech or Debate in either House they [the Senators and Representatives] shall not be questioned in any other place."

(1972); *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967). Justice Frankfurter's opinion for the Court in *Tenney* makes it clear that legislative immunity was "taken as a matter of course by those who severed the Colonies from the Crown and founded our nation," 341 U.S. at 372, and was understood, as evidenced by parallel state constitutional provisions, as applying both to the federal and state legislatures.[20] Legislative immunity is thus unique, historically recognized and stands on its own, separate from other immunities.

The Court has likewise recognized the validity of judicial immunity under 42 U.S.C. Section 1983 but, here too, the precedents read against, rather than in favor of, executive immunity. The Court, in *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961) recognized that what the 1871 Congress intended, in creating a "constitutional tort" was for the new principle of liability to be read against the background of tort law in existence at the time. For reasons parallel to those behind legislative immunity, judges had historically been granted immunity from tort liability at common law. That traditional understanding was solidified by this Court in *Bradley* v. *Fisher*, 13 Wall. 335 (1872) in which Justice Field traced the solid historical precedents for the immunity. This Court's extension of the immunity to actions charging deprivation of constitutional rights, rather than mere torts, is thus explainable by reference to the common law tradition, and incorporation of *some* traditional tort principles in Section 1983 in *Monroe*. See *Pierson* v. *Ray*, 386 U.S. 547 (1967). In an opinion closely pre-dating *Pierson*, the Third Circuit explained the exis-

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[20] The applicability, by analogy, of the speech and debate immunity to state legislatures was apparently assumed by the Court in *Doe*. See, e.g., 41 U.S.L.W. 4756 n. 13.

tence of judicial immunity to Section 1983 suit as a consequence of the normal rule of statutory construction that, absent clear legislative intent to the contrary, statutes are not to be read in derogation of the common law at the time of their enactment. *Bauers* v. *Heisel*, 361 F.2d 581 (3d Cir. 1966).

Neither of the theories would support inclusion of executive immunity in Section 1983. Executive immunity had *no* common law recognition in the United States. See, e.g., 2 F. Harper and F. James, The Law of Torts 1632-1633 (1956). The first case in this Court recognizing an executive immunity was *Spalding* v. *Vilas*, 161 U.S. 483 (1896), an action charging the Postmaster General with causing injury by an *ultra vires* act. The opinion of the Court, however, was made of whole cloth. The only American precedents cited were judicial immunity cases. Only two cases were cited which supported executive immunity, both were English and both, importantly, were defamation cases. The *Spalding* opinion demonstrates that there was no American precedent for executive immunity prior to 1896 and, therefore, that the argument that incorporation was either intended by the 1871 Congress, assumed by it or had to be engrafted on Section 1983 by canons of statutory construction is unsupportable. This is borne out by the legislative debates in 1871, which are devoid of support for an executive immunity.

The legislative and judicial immunity precedents discussed above make one further significant point. The immunities were created and perpetuated to protect the legislative and judicial branches *from the executive, not the citizenry.*

Another argument for the extension of executive immunity to the suit at bar has been the decision in *Barr* v.

Mateo, 360 U.S. 564 (1959), a defamation case. *Barr*, of course, has no direct bearing, since it creates a tort immunity, not a Civil Rights Act immunity.[21] Moreover, there was in fact no majority opinion in *Barr*. Justice Harlan wrote for himself and three other members of the

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[21] This point is of vital significance and has led to lower court holdings that, while official conduct which is both tortious and unconstitutional may be subject to a local law immunity to tort suit, it is not subject to immunity under Section 1983. See, e.g., *Roberts* v. *Williams*, 456 F.2d 819, and especially cases discussed at 830-831 (5th Cir.), cert. denied 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972); *Carter* v. *Carlson*, 447 F.2d 358, 365 (D.C. Cir. 1971), rev'd on other grounds as to other party, 409 U.S. 418 (1973); *Chafin* v. *Pratt*, 358 F.2d 349 (5th Cir. 1966).

Indeed, Justice Harlan, the writer of the plurality opinion in *Barr*, has twice recognized that constitutional deprivations may be different in kind, and more serious than mere torts and that, therefore, a federal remedy is warranted without the limitations of state tort remedies. See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 409 (1971); *Monroe* v. *Pape*, 365 U.S. 167, 195 (1961) (concurring opinions of Harlan, *J.*). Such a distinction is consistent with some of the original reasons behind adoption of Section 1983, which were that the state legal structure in parts of the country was suspect of failure to protect individual rights. See, e.g., *District of Columbia* v. *Carter*, 409 U.S. 418 (1973); *Monroe* v. *Pape*, *supra*.

Likewise, the opinion of Judge Hand for the Second Circuit in *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949) on which heavy reliance was placed below recognizes the distinction between tort immunity and Civil Rights Act immunity. *Gregoire* was a suit against the Attorney General of the United States and others for false arrest, and the court's immunity discussion relates strictly to that cause of action. A second cause of action was pleaded under 42 U.S.C. Section 1983 (actually its predecessor, Section 43 of Title 8, U.S.C.), but it was not well taken, since the Attorney General, being a federal officer did not act "under color of state law." The plaintiff, arguing in opposition to immunity, had relied on *Picking* v. *Pennsylvania R.R. Co.*, 151 F.2d 240 (3rd Cir. 1947). Judge Hand wrote:

> "The decision on which the plaintiff relies indeed holds that the doctrine of absolute immunity for official acts does not cover claims arising under § 43 of the Civil Rights Act; but it is not in point because, as we have just said, the case at bar is not within that section."

Court. Justice Black supplied the fifth vote in an opinion in which, noting that the suit was for libel against a public officer for release of information of public interest, he refused to read the District of Columbia libel laws to cover such conduct and suggested that, if he did, he would have to face the question of whether the libel laws violated the First Amendment, a question which he consistently answered in the affirmative thereafter. 360 U.S. at 577. See *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). He never embraced the immunity doctrine, nor did the four dissenters.

Of further significance, however, even Justice Harlan's *Barr* position reads in support of petitioner's case here. The significant feature of the law of defamation at the time of the *Barr* decision was that it was a species of liability without fault. If the Court were to reject the immunity argument in *Barr*, government officials contemplating release of information to the public, or to Congress, would have been faced with the risk of liability for publication of information without fault, i.e., when they were neither negligent as to the truth of statements made nor engaging in intentional falsification. Some restriction on liability was thus logical. Moreover, Justice Harlan's opposition to liability without fault was often stated, see, e.g., *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 67 *et seq.* (1971) (concurring opinion) and it was in fact he who led the law to its present position requiring proof of fault in all defamation actions. *Ibid.* See also *Curtiss Pub. Co.* v. *Butts*, 388 U.S. 130, 160 (1967) (opinion of Harlan, *J.*) and especially *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 58 (1971) (opinion of White, *J.* summarizing state of defamation law). See also, Kalven, *The Reasonable Man and the First Amendment*, 1967 Sup. Ct. Rev. 267.

The *Barr* decision would have been unnecessary if the law of defamation in 1960 had been the same as the law of defamation in 1971. Moreover, the point is particularly pertinent to the issue of liability under Section 1983 because, following the incorporation of general principles of tort law in *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961), the lower courts have consistently held that *fault* is an absolute prerequisite to liability for deprivations of life or liberty without due process of law caused by the governmental infliction of physical injury. See, e.g., *Roberts* v. *Williams*, 456 F.2d 819 (5th Cir.) cert. denied 404 U.S. 866 (1971), addendum 456 F.2d 834 (1972); *Carter* v. *Carlson*, 447 F.2d 358 (D.C. Cir. 1971), rev'd on other grounds as to other party, 409 U.S. 418 (1973); *Jenkins* v. *Averett*, 424 F.2d 1228 (4th Cir. 1970); *Stringer* v. *Dilger*, 313 F.2d 536 (10th Cir. 1963); *Brazier* v. *Cherry*, 293 F.2d 401 (5th Cir.), cert. denied 368 U.S. 921 (1961). Fault is, of course, alleged in this case.

In fact, in addition to there being an absence of precedent for absolute immunity under Section 1983, the one plausible argument in support, the need to protect public officers from liability when they are not in the wrong is inapposite.[22]

Furthermore, *even if* there were an immunity from suit for official acts, there are severe limitations on that immunity which, under the allegations of the present complaint, may well be exceeded. As Judge Medina's opinion

[22] This point is supported by that portion of *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967) dealing with police officers in which the Court, noting a common law defense basically of non-faulty arrest, eschewed immunity. The relation of fault to immunity is also considered in the majority and concurring opinions of the D.C. Circuit in *Carter* v. *Carlson*, *supra*.

on remand in *Bivens*, *supra*, notes, even if there is an immunity for constitutional deprivations, it is only available to those who exercise discretionary, rather than ministerial, powers with respect to the subject matter of suit and, even then, only if the conduct occurred within the scope of office, 456 F.2d 1339 (2d Cir. 1972). Both "scope of office" and "discretionary function" are factual issues, *ibid.*, and cannot be resolved at the pleading stage. Compare *Walker* v. *Courier Journal and Louisville Times Co.*, 368 F.2d 189 (6th Cir. 1966) with *Washington Post Co.* v. *Keogh*, 365 F.2d 965 (D.C. Cir. 1966). See *Lasher* v. *Shafer*, 460 F.2d 343 (3rd Cir. 1972). Here, exceeding the scope of office was specifically pleaded (87a).

No view of the immunity issue could support the decision below.

IV.

The decision in *Gilligan* v. *Morgan* does not preclude the granting of damages at law for the claims raised by the complaint.

In *Gilligan* v. *Morgan*, 41 U.S.L.W. 4966 (1973) an injunction action arising from the same facts which gave rise to this suit, the Court, in reversing, held that the judicial remedy was not appropriate to control, by injunction, the way in which the National Guard troops are trained, armed or ordered in emergencies. In holding future control of the National Guard to be an executive and legislative, rather than judicial, function, the Court did not preclude the granting of damages for conduct which otherwise could not form the basis for injunctive relief. The Chief Justice wrote:

"It is important to note at the outset that this is not a case in which damages are sought for injuries sustained during the tragic occurrence at Kent State. Nor is it an action seeking a restraining order against some specified and imminently threatened unlawful action. Rather, it is a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard."

The limited nature of the *Gilligan* v. *Morgan* opinion was, of course, necessary to reconcile it with the precedents, which do not afford an immunity to governmental officers for damages merely because they acted during an emergency or because, in the case of the Governor, the troops were called out or an emergency was declared. The case most heavily relied on below—*Moyer* v. *Peabody*, 212 U.S. 78 (1909)—does not support the dismissal.

Moyer v. *Peabody* was an action for damages brought under Section 1983 against a former governor, adjutant general, and a captain in the National Guard. The Governor had ordered Moyer's arrest (212 U.S. at 82-83) because Moyer was a leader of a union whose members were believed to be the cause of rioting that was taking place (212 U.S. at 83, 84). The complaint alleged that Moyer was arrested, and imprisoned for two-and-a-half months, without probable cause. 212 U.S. at 82. It was further alleged that Moyer was not charged with any crime. *Id.* The Supreme Court assumed that a state of insurrection existed, 212 U.S. at 84, and that the former governor had acted in good faith, *id.*, since it was not alleged the Governor acted in bad faith. 212 U.S. at 85. It was in this context that the Court announced its rule:

> So long as such arrests are made in good faith and in the honest belief that they are needed in order to

> head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief. 212 U.S. at 85.

For several reasons, *Moyer* v. *Peabody* does not support dismissal of the complaint. First, the Court did *not* give a governor complete and total immunity from liability. *Moyer* v. *Peabody* held only that a governor is not liable if he acts in good faith. Since the complaint in *Moyer* v. *Peabody* did not allege a lack of good faith, but merely a lack of probable cause, the Court ruled that dismissal of the complaint was proper. In the case at bar, unlike *Moyer* v. *Peabody*, the complaint alleges that former Governor Rhodes "intentionally, recklessly, wilfully and wantonly" engaged in conduct which caused decedent's death. Complaint, paras. 13(a), 15 (87a). These allegations clearly charge Respondent Rhodes with bad faith conduct, and thus even under *Moyer* v. *Peabody* are sufficient to state a cause of action. See *McLaughlin* v. *Tilendis*, 398 F.2d 287, 290 (7th Cir. 1968).

Second, the rule of *Moyer* v. *Peabody* is limited to situations of actual insurrection. As the Court subsequently explained, "[T]he general language of the opinion [in *Moyer* v. *Peabody*] must be taken in connection with the point actually decided." *Sterling* v. *Constantin*, 287 U.S. 378, 400 (1932). The "point actually decided" was that, *in an insurrection* (212 U.S. at 84), "the temporary detention of one believed to be a participant" (287 U.S. at 400) in the insurrection did not give rise to a cause of action for damages against the Governor. Absent an insurrection, then, the rule of *Moyer* v. *Peabody* is inapplicable. It declares no general immunity for wrongs committed by a governor.

Finally, in *Sterling* v. *Constantin*, 287 U.S. 378 (1932), the Court overruled the premise of *Moyer* that a governor's determination of the need for use of force was unreviewable and makes the question of the legitimacy of his conduct a judicial one. *Accord, Faubus* v. *United States*, 254 F.2d 797 (8th Cir.), *cert. denied*, 358 U.S. 829 (1958) (injunctive relief granted against use of National Guard); *Wilson & Co.* v. *Freeman*, 179 F. Supp. 520 (D. Minn. 1959) (same); *Joyner* v. *Browning*, 30 F. Supp. 512 (W.D. Tenn. 1939) (same); *Strutwear Knitting Co.* v. *Olson*, 13 F. Supp. 384 (D. Minn. 1936) (same); *Russell Petroleum Co.* v. *Walker*, 162 Okla. 216, 19 P.2d 582 (1933) (same); *Hearon* v. *Calus*, 178 S.C. 381, 183 S.E. 13 (1935) (acts of governor subject to judicial review). See *Cox* v. *McNutt*, 12 F. Supp. 355 (S.D. Ind. 1935) (denying relief, but stating acts of governor are reviewable); *Powers Mercantile Co.* v. *Olson*, 7 F. Supp. 865 (D. Minn. 1934) (same). See also *Bishop* v. *Vandercock*, 228 Mich. 299, 200 N.W. 278 (1924) (narrowly interpreting statute to avoid immunity for negligent acts of National Guard troops and suggesting unconstitutionality if a contrary interpretation were made).

Nothing in the *Gilligan* decision disturbs the traditional American view that constitutional rights are not suspended by declaration of emergency, see, e.g., *Sterling* v. *Constantin*, 287 U.S. 378 (1932); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 124-125 (1866), nor that liability for injuries caused is not precluded by the declaration of emergency. See, e.g., *Mitchell* v. *Clark*, 110 U.S. 633 (1884), and especially partial dissent of Field, *J.* at 640; *Bishop* v. *Vandercock, supra*, esp. 200 N.W. at 280; *O'Shea* v. *Stafford*, 122 La. 444, 47 So. 764 (1908). Actually, *Gilligan* points up the need for relief here.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the case remanded for trial on the merits.

Respectfully submitted,

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